United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1593

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1593

UNITED STATES OF AMERICA,
Respondent,

—*against*—

JULIUS SCHURKMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

We submit this REPLY BRIEF on behalf of the appellant, JULIUS SCHURKMAN, in order to reply to the various misstatements of law and fact proffered by the Government in its brief.

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POINT I

(Responding - Government's Point I)

VIEWING THE COURT'S CHARGE AS A WHOLE, THE COURT CONVEYED THE UNMISTAKABLE IMPRESSION THAT THE APPELLANT'S FAILURE TO OFFER TESTIMONY ON HIS OWN BEHALF WAS BECAUSE HE HAD SOMETHING TO HIDE.

Although the Government states that Judge Connor's remark, that "Obviously, if (Schurkman) were going to give testimony against himself, he wouldn't testify" would "perhaps have been better left unsaid', (p. 10, Government's Brief), the Government nevertheless contends that reviewing the Court's instruction as a whole, the Court's remarks "did not seriously prejudice Schurkman". It is precisely appellant's contention that the charge viewed as a whole with regard to appellant's failure to take the witness stand conveyed an unmistakable impression that Schurkman's failure to testify was because he "had something to hide". It was the Court's overemphasizing again and again that he doesn't have "something to hide" coupled with the statement, "Obviously, if he were going to give testimony against himself he wouldn't testify", that is the graveman of the error. It is a suggestion by the Court to the jury that the reason the defendant did not testify was because he had something to hide. His charge invited them to draw that conclusion. The effect

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of that supplemental charge was devastating. It was the last words the jury heard from the judge prior to their deliberations. It is the supplemental charge viewed as a whole, which deprived appellant of his fundamental Fifth Amendment rights.*/

In none of the cases cited by respondent, (U.S. v Schabert, 362 F.2d 369 (2nd Cir.), cert. den. at 385 U.S. 919 (1966); United States v Tannuzzo, 174 F.2d 177 (2nd Cir.) cert. den. 338 U.S. 815 (1949); United States v Van Drunen, 501 F.2d 1393 (7th Cir.) cert. den. 419 U.S. 1091 (1974)), were the charges even remotely as prejudicial as the one in the case at bar. Here, just prior to deliberation, the Court stated to the jury what it believed to be the obvious, that, "if he were going to give testimony against himself, he wouldn't testify". Appellant's silence took on the precise dimension which the Fifth Amendment forbids. Appellant's silence created the inference of guilt and pressed upon him the burden of proving his innocence. Respondent's assertion that the Court's charge was not

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*/ The Government's failure to appreciate the inherently prejudicial nature of Judge Connor's instructions, is underscored by the fact that the Government, in its own Brief, at p. 16, criticizes the defendant, Schurkman, for failing to testify and explain his activities.

improper "would be blinking reality" (Turner v Louisiana, 379 U.S. at 473). The prejudice inherent in the Court's charge was elementary, fundamental, and inescapable.

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POINT II

(Replying to Appellee's Point II)

THE PROSECUTOR'S SUMMATION WAS IMPROPER AND THE JUSTIFICATIONS PROFFERED LACK ANY SUBSTANTIVE BASIS.

The Government attempts to justify the inflammatory remarks of the prosecutor in summation by claiming support in case law and the facts of the case at bar. It is respectfully submitted that neither reason imputes a degree of propriety to the prosecutor's statements and significantly the justifications proffered reveal a fatal flaw in the Government's case.

Initially, the objection raised by the appellant in his brief (Appellant's Brief, POINT II, pp. 21-26) challenged the remarks made by the prosecutor with reference to the possible future criminal conduct of the defendant, JULIUS SCHURKMAN. The Government fails to answer this argument and attempts to justify its prejudicial remarks by claiming he is allowed to "convey to the jury the importance of the task before them", "the value the Government places on the prosecution of certain crimes", and "suggesting to the jury that protection of the public is among its functions". These may be proper areas of

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comment by the prosecutor. Appellant neither controverts nor agrees with this contention because this is not the issue at bar. Relying on these judicial cliches, the Government attempts to license the prosecutor's comments, a "smoke screen", to the real issue at bar.

The graveman of appellant's complaint was the reference to his future criminal conduct. The possible future criminal conduct of an accused is an area which cannot be alluded to in summation. United States v Sprengel, 103 F.2d 876 (3rd Cir., 1939). Cases cited by the Government do not controvert this fundamental point of law. In Birnbaum v United States, 356 F.2d 856 (8th Cir., 1966), the Court found that the Assistant United States Attorney's comments were not improper in view of the substantial testimony voluntarily offered by defendant while on the stand during direct examination. The defendant in Birnbaum volunteered information about his criminal record and violent nature. The court found the prosecutor's remarks non-prejudicial because the evidence justified the statements. In the case at bar, Julius Schurkman did not testify about any "illicit' past. Moreover, there was not a scintilla of evidence before the jury to support the

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prosecutor's statements herein. In United States v Delay, 500 F.2d 1360 (8th Cir., 1974), the prosecutor's remark cautioned the jury against turning the defendant "loose on society" and did not refer to future criminal acts as the prosecutor did herein. Nevertheless, the holding in Delay was based upon principles of harmless error which do not apply in this case.

The Government maintains that in assessing the prejudicial impact of the prosecutor's remarks consideration must be given to the strength of the Government's case. However, in the Government's POINT III, the justification given for the introduction of the hearsay conversations and transaction between Agent Gubenko and James Taylor is that the conversations between Gubenko and appellant were "cryptic", "ambiguous", "contained few explicit references to bribes",*/ and "vague illusions in Schurkman's earlier remarks". Thus, by Government's own admission, the actions of JULIUS SCHURKMAN were equivocal. The Government at trial and now on this appeal seeks to fill the gaps in its proof by inflammatory references to JULIUS SCHURKMAN'S Character. At the trial, there was no evidence of other similar acts laid before the jury., and the issue of Schurkman's disbarment was never a

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*/ The Government's assertion at p. 16 of its Brief, that appellant "reveals an astonishing indifference to the facts" is disingenuous in the extreme in light of the Government's own contention that the proof against Julius Schurkman "contain few explicit references to bribes".

fact in evidence at trial. It is utterly in bad faith for the Government to point to this latter incident which was never elicited before the jury to overcome its error. (Government Brief, p. 11)

Apparently the Government feels it needs to "impress upon the jury" and this court not facts supporting guilt, but emotional rhetoric. The injection of JULIUS SCHURKMAN'S character and propensities into a case where there are "few explicit references to bribes" makes the Government's prejudicial remarks hardly "harmless."

CONCLUSION

APPELLANT-DEFENDANT SHOULD BE GRANTED A NEW TRIAL.

Respectfully submitted,

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Rec'd 3/7
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